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NO. 08-453

IN THE
Supreme Court of the United States

ANDREW M. CUOMO, in his official capacity as Attorney General for the State of New York,
Petitioner,
v.
THE CLEARING HOUSE ASSOCIATION, L.L.C. and THE OFFICE OF THE COMPTROLLER OF THE CURRENCY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

SRI SRINIVASAN
(*Counsel of Record*)
KATHRYN E. TARBERT
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Amicus Curiae

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

The Chamber of Commerce of the United States of America ("the Chamber") respectfully submits this brief as *amicus curiae* in support of respondents.[1]

INTEREST OF AMICUS CURIAE

The Chamber is the nation's largest federation of business companies and associations. The Chamber represents an underlying membership of more than 3,000,000 business and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of national concern to American business.

This is such a case. The Chamber's members include not only national banks and their operating subsidiaries but also millions of other businesses subject to federal statutes and regulations that preempt state and local laws. The power of Congress (either directly or through administrative agencies)

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. A letter from the Solicitor General consenting to the filing of this brief, as well as letters reflecting petitioner's and the Clearing House's blanket consent to the filing of *amicus curiae* briefs, are on file with the Clerk.

to preempt state and local law, as well as the circumstances in which federal preemption should be found to exist, are vitally important to business and to the national economy. Accordingly, the Chamber and its members have a substantial interest in ensuring that this Court properly resolves the issues raised in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

For the reasons explained by respondents, the Comptroller of the Currency's visitorial powers regulation, 12 C.F.R. § 7.4000, provides the best reading of the term "visitorial powers" in the visitorial powers statute, 12 U.S.C. § 484(a). Because the Comptroller's regulation contains the best interpretation of the statutory terms, and because it is undisputed that giving effect to that reading of the statute would dictate affirming the judgment of the court of appeals, this Court could affirm the judgment below without addressing whether the regulation is entitled to *Chevron* deference. *See Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 865-66 (1984).

Insofar as the Court addresses that question, petitioner and his *amici* argue strenuously that the visitorial powers regulation should be denied *Chevron* treatment, because, they assert, the regulation is "an agency declaration about preemption." Pet. Br. 53. The contention that the regulation falls outside of *Chevron* because it in effect "declares preemption" gains the most elaborate treatment in an *amicus* brief filed by the National Governors Association (NGA) and various other entities. According to the NGA and petitioner, courts, not agencies, should

bear principal responsibility for determining the existence and scope of federal preemption. Petitioner and the NGA accordingly submit that an agency should be considered to lack any authority—and thus to command no deference—on matters of preemption unless Congress expressly delegates to the agency specific authority to preempt state law. They conclude that Congress has not specifically delegated preemptive authority to the Comptroller, and that the Comptroller's visitorial powers regulation therefore is not entitled to *Chevron* deference.

The Chamber of Commerce submits this brief in response to the arguments pressed by petitioner and the NGA, and in particular, to explain that petitioner and the NGA: (i) misconceive the way in which the Comptroller's regulation affects the scope of federal preemption; and (ii) misunderstand the circumstances in which *Chevron* deference extends to agency regulations bearing on preemption. Contrary to the characterization of petitioner and the NGA, the visitorial powers regulation does not purport simply to "declare" state law preempted by federal law. Rather, the regulation engages in the quintessential *Chevron* function of setting forth an authoritative interpretation of substantive statutory terms bearing directly on the agency's responsibilities, *viz.*, an interpretation of the critical statutory term "visitorial powers." Although interpretation of those statutory terms in turn affects the circumstances in which the statute preempts state visitorial authority, that preemptive consequence arises from *Congress*'s decision to render the visitorial powers statute preemptive, not from an *agency* declaration of preemption. This Court has settled that

preemptive consequences of that kind—*viz.,* preemption dictated by the *statute* itself—afford no basis for declining to give full *Chevron* deference to the agency's interpretation of the statute. *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 743-44 (1996).

Even assuming *arguendo* that the Comptroller's regulation were not squarely governed by the Court's decision in *Smiley*, the arguments made by petitioner and the NGA for denying the regulation *Chevron* treatment are unpersuasive. The premise of those arguments is that an agency generally lacks authority to effect preemption "on the agency's own authority," NGA Br. 3—*viz.*, absent a determination by Congress to preempt state law—unless Congress specifically delegates to the agency the power to preempt state law. That premise cannot be squared with this Court's decisions. The Court has expressly held in a series of decisions that an agency's promulgation of a preemptive regulation is fully entitled to *Chevron* treatment notwithstanding that the agency acts under a general grant of rulemaking authority rather than any specific delegation of authority to preempt state law. That conclusion is fully consistent with the assumptions underlying *Chevron*: contrary to the argument of petitioner and the NGA, agencies, no less than courts, are well-suited to address the scope of federal preemption, because the decision to preempt state law is fundamentally a *policy* judgment of the kind within the core of an agency's traditional *Chevron* authority.

The decisions relied on by petitioner and the NGA do not suggest that courts should decline to defer to agency determinations about preemption. Instead, this Court has settled that, "*even in the area of*

pre-emption, if the agency's choice to pre-empt 'represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, [a court] should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.'" *New York v. FCC*, 486 U.S. 57, 64 (1988) (emphasis added) (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)). Petitioner and the NGA fail to come to terms with that long-settled understanding, and their failure to do so undermines their arguments for declining to accord *Chevron* deference to the Comptroller's visitorial powers regulation.

ARGUMENT

I. THIS COURT ACCORDS BROAD DEFERENCE TO AN AGENCY'S INTERPRETATION OF A STATUTE WHERE, AS HERE, THE STATUTE ITSELF IS PREEMPTIVE

Agency regulations may affect the existence and extent of federal preemption in a number of ways. First, and of particular salience here, when a statute bearing on the agency's responsibilities itself preempts state law, the agency's interpretation of the statutory terms might in turn affect the statute's preemptive scope. Alternatively, an agency might adopt a substantive regulation having the force of law and prescribe that the regulation preempts state law or precludes state enforcement activities, in which case the agency rather than Congress would dictate the preemptive result. Finally, an agency might take action designed solely to declare the preemption of state law.

The Comptroller's visitorial powers regulation fits squarely within the first category. It therefore commands full *Chevron* deference under this Court's precedents. *See Smiley*, 517 U.S. at 743-44. And in any event, even assuming *arguendo* that the regulation falls outside the four corners of the first category, it does not "merely purport to declare the preemptive scope of a federal statute." Pet. Br. 52. Rather, it construes statutory terms that directly bear on the agency's exercise of its responsibilities. There is thus no sound basis for declining to accord the regulation *Chevron* deference.

A. The Comptroller's Regulation Implements The Substantive Terms Of A Statute Made Preemptive By Congress

This Court extends *Chevron* deference "to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes they are charged with administering." *Smiley*, 517 U.S. at 739. And it is settled that such deference "extends to the judgments of the Comptroller of the Currency with regard to the meaning of the banking laws." *Id.*; *see NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-57 (1995).

The Comptroller's visitorial powers regulation interprets the term "visitorial powers" in the visitorial powers statute, 12 U.S.C. § 484(a). That statute prescribes that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law," *id.*, and federal law otherwise makes clear that the Comptroller bears responsibility for exercising visitorial authority over national banks. *See*

Nationsbank, 513 U.S. at 254 (Comptroller is "charged by Congress with superintendence of national banks"). The Comptroller's visitorial powers regulation sets forth that "visitorial powers include," *inter alia*, "[e]xamination of a bank," "[i]nspection of a bank's books and records," and "[e]nforcing compliance with any applicable federal or state laws concerning" a national bank's federally-authorized activities. 12 C.F.R. § 7.4000(a)(2)(iv).

Because that interpretation directly pertains to the agency's performance of its responsibilities, *see* 69 Fed. Reg. 1,895, 1,899 (Jan. 13, 2004) (regulation "clarif[ies] the scope of the visitorial powers authorized to the OCC pursuant to section 484"), the interpretation squarely implicates *Chevron*. *See*, *e.g.*, *Smiley*, 517 U.S. at 739; *Chevron*, 467 U.S. at 842-45. To be sure, the Comptroller's interpretation of "visitorial powers" has consequences for the scope of federal preemption of state enforcement authority. In particular, because the statute prescribes that "[n]o national bank shall be subject to visitorial powers *except as authorized by Federal law*," 12 U.S.C. § 484(a) (emphasis added)—and federal law confers visitorial power on the Comptroller and not, with very limited exceptions, the States—any matter falling within the Comptroller's visitorial authority necessarily falls outside the visitorial authority of state officials or agencies (and unauthorized federal officials or agencies) over national banks. But that preemptive consequence arises, not from the Comptroller's regulation, but instead from the statute itself, which by its terms makes federally-authorized visitorial authority exclusive. As the Comptroller explained when issuing the regulation, the "agency

is implementing a *statute* that has preemptive effect." 69 Fed. Reg. at 1,903 (emphasis added).

Petitioner and the NGA therefore err in supposing that this case involves a regulation in which an agency, rather than interpret "the substantive meaning of federal statutes," instead "merely purport[s] to declare the preemptive scope of a federal statute." Pet. Br. 52; *see* NGA Br. 30 (contending that Comptroller lacks "power to declare state law preempted"). To the contrary, the regulation interprets the substantive meaning of "visitorial powers" in Section 484(a); and Congress, not the Comptroller, prescribed the preemption of state law. There is thus no occasion to deny the regulation *Chevron* deference on the ostensible basis that it "declares the preemptive scope of a federal statute." Pet. Br. 48.[2]

B. The Court's Decision In *Smiley* Requires According *Chevron* Deference To The Comptroller's Regulation

This Court has resolved that where, as here, an agency interprets the substantive terms of a statute, the interpretation commands full *Chevron* deference notwithstanding that it might in turn affect the scope of preemption dictated by the statute itself.

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[2] It is of no moment that the regulation explains that "[o]nly the OCC . . . may exercise visitorial powers with respect to national banks," and that "[s]tate officials may not exercise visitorial powers with respect to national banks." 12 C.F.R. § 7.4000(a)(1). That language simply describes the preemptive consequence dictated by the *statute*. The Comptroller has not argued that the description aims *itself* to declare preemption of its own force.

The Court's decision in *Smiley v. Citibank, supra,* involved precisely that situation. *Smiley* concerned the Comptroller's interpretation of the term "interest" in 12 U.S.C. § 85, which permits a national bank to charge "interest at the rate allowed by the laws of the State" in which the bank maintains its main office. The Comptroller adopted a regulation construing the term "interest" to encompass late-payment fees. This Court extended deference to that interpretation and sustained it. 517 U.S. at 739-47.

The petitioner in *Smiley* argued that *Chevron* deference failed to apply to the regulation because it interpreted a statute that preempts state law, and the agency's interpretation of "interest" to encompass late-payment fees thus would have the effect of expanding the scope of the statute's preemption of state law. 517 U.S. at 743-44. In light of that consequence for preemption, the petitioner contended, "a court [should] make its own interpretation" of the statutory term "interest" rather than deferring to the agency's interpretation. *Id.* at 743. This Court rejected that argument, explaining that it "confuses the question of the substantive (as opposed to pre-emptive) *meaning* of a statute with the question of *whether* a statute is pre-emptive." *Id.* at 744. As to the "latter question," there was "no doubt" under this Court's decisions "that [the statute] pre-empts state law." *Id.* (citing *Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978)). The sole question thus concerned the "substantive meaning" of the statutory term "interest," a question as to which *Chevron* deference fully applied. *Id.*

This case is controlled by *Smiley*. Here, as in *Smiley*, the pertinent statute is preemptive insofar as it precludes state visitorial authority. *See Watters v. Wachovia Bank, N.A.,* 550 U.S. 1, 13 (2007) (explaining that the visitorial powers statute "specifically vests exclusive authority to examine and inspect in OCC," thus rendering national banks "immune from state visitorial control"). Additionally, here, as in *Smiley*, the statute directly bears on the agency's performance of its enforcement responsibilities. And here, as in *Smiley,* the agency regulation interprets the substantive terms of the statute—the term "interest" in *Smiley* and the term "visitorial powers" here. As a result, here, as in *Smiley*, the fact that the agency's interpretation has consequences for the statute's preemptive reach provides no basis for declining to defer to the interpretation.

Smiley disposes of the NGA's contention that, "[i]n order to preserve the proper allocation of institutional roles, all predicate legal determinations that lead to a finding of preemption must be reviewed independently" by the courts rather than deferentially under *Chevron*. NGA Br. 29. The NGA expresses concern that according *Chevron* deference to the Comptroller's understanding of the term "visitorial powers" would "lead[] to the conclusion that state enforcement of state law is preempted, because it is a type of visitorial authority given exclusively to the OCC" under the statute. *Id.* But precisely the same concern could have been expressed in *Smiley* with respect to the agency's understanding of the term "interest," which likewise led to the conclusion that state laws concerning late-payment fees were preempted. Withholding deference for that reason, as

the NGA suggests, could profoundly affect the routine application of *Chevron*. Indeed, under the NGA's approach, *Chevron* would be inapplicable anytime an agency implements a statute that itself preempts state law—even when the agency acts within the core of its *Chevron* authority—because the agency's implementation affects the statute's preemptive reach. The Court rejected such an approach in *Smiley*, where it extended full *Chevron* deference to the agency's understanding of an ambiguous statutory term, notwithstanding that it necessarily affected the scope of federal preemption. The same conclusion should follow here with respect to the Comptroller's visitorial powers regulation.

II. THERE IS NO BASIS FOR DECLINING TO ACCORD *CHEVRON* DEFERENCE TO AN AGENCY PREEMPTION DETERMINATION IN THE CIRCUMSTANCES OF THIS CASE

Assuming *arguendo* that the Comptroller's regulation does more than implement the term "visitorial powers" and also independently determines the scope of federal preemption—such that *Smiley* no longer would fully control—the regulation nonetheless would remain entitled to *Chevron* deference. In that event, the regulation would not be one "whose sole purpose [were] to preempt state law rather than to implement a statutory command." *Watters*, 550 U.S. at 21 n.13. Nor would it "merely purport to declare the preemptive scope of [the] federal statute." Pet. Br. 52. Rather, the regulation still would interpret the statutory term "visitorial powers" and that interpretation still would bear directly on the

agency's exercise of its responsibilities. The fact that the regulation—by hypothesis—would also result in federal preemption would afford no ground for denying it *Chevron* treatment.

In a series of decisions both predating and postdating *Chevron*, the Court has established that deference fully applies to regulations adopting substantive rules and determining that those rules preempt state law. *See United States v. Shimer*, 367 U.S. 374 (1961); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *New York v. FCC*, 486 U.S. 57 (1988); *New York v. FERC*, 535 U.S. 1 (2002). The Court's decision in *New York v. FCC* is illustrative. There, the FCC, acting under its general rulemaking power, adopted regulations establishing signal strength standards for cable systems and also preempting local authorities from applying any more stringent standards. This Court accorded *Chevron* deference to, and sustained, the FCC's regulations, including their preemption of local standards. The Court explained that, when an agency is given a "broad grant of authority to reconcile conflicting policies," that authority applies "even in the area of preemption." 486 U.S. at 64.

Petitioner and the NGA do not discuss—much less come to terms with—that series of decisions. The various arguments raised by petitioner and the NGA for denying *Chevron* deference not only are contrary to those decisions, but they also are unpersuasive in any event.

A. The Reasons Offered By Petitioner And The NGA For Denying *Chevron* Deference Are Unsound

1. *No specific delegation of pre-emptive authority is necessary*

a. The central premise of the NGA's and petitioner's argument for denying *Chevron* deference when an agency preempts state law "on [its] own authority" is that an agency lacks authority to adopt a preemptive regulation unless Congress specifically delegates the authority to preempt state law. NGA Br. 4, 12; *see* Pet. Br. 53. That premise is flatly irreconcilable with this Court's decisions.

The Court directly addressed the matter in *New York v. FCC* in extending deference to the preemptive regulation at issue there. As the Court explained, a "pre-emptive regulation's force does not depend on express congressional authorization to displace state law," and a "narrow focus on Congress' intent to supersede state law" therefore "is misdirected." *New York v. FCC*, 486 U.S. at 64 (quoting *de la Cuesta*, 458 U.S. at 154). Rather, "[i]f the agency's choice to pre-empt 'represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute,'" the regulation should be sustained unless "the accommodation is not one that Congress would have sanctioned." *Id.* (quoting *Shimer*, 367 U.S. at 383); *compare Chevron*, 467 U.S. at 845 (applying same standard).

The Court in *de la Cuesta* accordingly affirmed a preemptive regulation promulgated pursuant to a

general grant of authority to prescribe "'rules and regulations . . . for the organization, incorporation, examination, operation, and regulation of [Federal Savings and Loan Associations].'" 458 U.S. at 145 (quoting 12 U.S.C. § 1464(a) (1976 ed., Supp. IV)); *see id.* at 170. Here, similarly, the Comptroller possesses general authority to "prescribe rules and regulations to carry out the responsibilities of the office." 12 U.S.C. § 93(a). That general grant of authority, under this Court's decisions, fully encompasses the authority to promulgate preemptive regulations commanding *Chevron* deference.

b. Petitioner errs in contending (Pet. Br. 45-46) that the "presumption against preemption" requires conditioning an agency's ability to promulgate preemptive regulations on a specific grant of authority to preempt state law. The Court rejected precisely that argument in *New York v. FERC, supra.* The Court explained that the determination whether "a federal agency may pre-empt state law" "does not involve a presumption against pre-emption." 535 U.S. at 18. Rather, the proper focus of the inquiry, as set forth in *de la Cuesta* and *New York v. FCC*, is whether the agency has acted within its delegated authority. *Id.* And because the statute at issue in *New York v. FERC* "unambiguously authorize[d] FERC to assert jurisdiction over" the activities encompassed by its preemptive regulation, the Court upheld the agency's election to preempt state law. *Id.* at 19-20.[3]

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[3] No presumption against preemption applies in the context of the National Bank Act in any event. *See Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 32 (1996) (explaining that "grants of both enumerated and incidental 'powers' to

2. *Agencies are well equipped to make policy judgments concerning preemption of state law*

The fundamental reason that an agency's preemptive regulation requires no specific grant of preemptive authority is that an agency's determination that preemption is warranted—like all other agency determinations residing within the core of its *Chevron* authority—is at root a *policy* judgment. *Chevron* rests on the insight that an ambiguous statutory term involves an "implicit" delegation of authority to choose an interpretation that best promotes the statute's policies. *See Chevron*, 467 U.S. at 844. The decision therefore speaks in terms of whether the agency's "choice represents a reasonable accommodation of conflicting *policies* that were committed to the agency's care by the statute." *Id.* at 845 (emphasis added) (quoting *Shimer*, 367 U.S. at 382).

The decision whether displacement of state law is warranted in furtherance of a federal statute, and if so to what extent, is just such a policy judgment. *See New York v. FCC,* 486 U.S. at 64 (explaining that "choice to pre-empt" warrants deference "if it "represents a reasonable accommodation of conflicting policies . . . committed to the agency's care"). As with other policy judgments, the decision whether to preempt state law implicates the agency's expertise concerning "the relevant history and background" of the statute and subject matter. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000) (discussing pre-

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national banks" are "not normally limited by, but rather ordinarily pre-empt[], contrary state law").

emption). While policy judgments about preemption involve considerations of federalism, *see* NGA Br. 15-17; Pet. Br. 19, that in no way calls into question an agency's capacity to make them. Indeed, the opposite is true. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 496 (1996) ("agency is uniquely qualified to determine whether a particular form of state law stands as obstacle to the accomplishment and execution of the full purposes and objectives of Congress") (internal quotation marks omitted); *id.* at 506 (Breyer, J., concurring) (agency has "special understanding of . . . whether (or the extent to which) state requirements may interfere with federal objectives").

For instance, agencies are well-versed in, *inter alia*, the varying details of the potentially fifty different state regulatory schemes bearing on the subject; the nature, frequency, and breadth of their application; the state of empirical research and data concerning the subject matter; the record of experience under different types of regulatory schemes; and the philosophical approach to regulation preferred by the Executive in office—all of which may be brought to bear on a decision whether to preempt. *See* NGA Br. 19 (noting that agencies are aided in their preemption decisions by their "ability to undertake wide-ranging investigations of industry structure[s] and similar variables" and a "capability of finding legislative facts that far surpasses courts").

Moreover, agencies have the resources to monitor the effect of federal regulation on state law in a way that Congress and the Courts may be less equipped to accomplish. *See Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 721 (1985) ("Congress, unlike an agency, normally does not fol-

low, years after the enactment of federal legislation, the effects of external factors on the goals that the federal legislation sought to promote."). An agency therefore can translate its understanding of the interplay between federal and state requirements "into *particularized* preemptive intentions accompanying its various rules and regulations," *Medtronic*, 518 U.S. at 506 (1996) (Breyer, J., concurring) (emphasis added), rather than the broader strokes with which Congress often legislates. *Cf. Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980) (noting that "legislators cannot foresee all eventualities"). In fact, agencies are required to adhere to Executive Order 13,132, which mandates that they "carefully assess the necessity" of "any action that would limit the policymaking discretion of the States," Exec. Order No. 13,132 § 3(a), 64 Fed. Reg. 43,255, 43,256 (Aug. 10, 1999), and that "regulatory preemption of State law shall be restricted to the minimum level necessary to achieve the objectives of the statute pursuant to which the regulations are promulgated," *id.* § 3(d)(4), 4(c).[4]

An agency determination concerning preemption therefore involves far more than simply a traditional application of "legal" principles and precedents. *See* NGA Br. 13-14; Pet. Br. 50. And even if an agency engaged solely in a legal analysis when deciding whether to preempt state law, that would afford no reason to deny its decision deference. *See*, *e.g.*, *Nw. Pipeline Corp. v. FERC*, 61 F.3d 1479, 1486 (10th

[4] *See*, *e.g.*, 69 Fed. Reg. at 1,895 (detailing comments Comptroller received about the visitorial powers regulation from consumer groups, "a state bank supervisors' association," and "state bank supervisors' offices").

Cir. 1995) (noting that, in interpreting energy tariffs, "the Commission applies the same canons of contract construction as would a reviewing court"). *Chevron*, after all, "rejected the view that a court may freely review an agency on pure questions of law." *Nat'l Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1569 (D.C. Cir. 1987). Thus, this Court defers to an agency's exercise of discretion regardless "whether it involve[s] questions of law or fact." *Shimer*, 367 U.S. at 381-82; *see*, *e.g.*, *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 845 (1986) (reversing decision in which court of appeals refused to defer to agency's interpretation "because of the 'statutory interpretation-jurisdictional' nature of the question at issue"); *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 830 n.7 (1984) (rejecting argument that "because 'the scope of the [statutory clause in question] is essentially a jurisdictional or legal question concerning the coverage of the Act,' we need not defer to the expertise of the Board") (quoting Br. for Resp., No. 82-960, at 13)).

3. *Regulations implicating the agency's jurisdiction are not excepted from* Chevron *deference*

The NGA and petitioner suggest that an agency's decision to preempt state law should be denied deference absent a specific grant of preemptive authority because the agency may act out of an incentive to "increas[e] [its] own regulatory power." Pet. Br. 50; *see* NGA Br. 17-18; Cong. Br. 17-25. As petitioner acknowledges (Pet. Br. 50), however, the "rule of deference applies to an agency's interpretation of a

statute designed to confine its authority." *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 380 (1988) (Scalia, J., concurring).

That deference is not, as the NGA and petitioner suggest, afforded "presumably" (NGA Br. 18) or "largely" because "it may be difficult in some case[s] to distinguish[] between jurisdictional and non-jurisdictional issues." Pet. Br. 50. On the contrary, as the Court explained when it rejected a similar argument in *Schor*, 478 U.S. at 845, the Court defers to an agency's assessment of its jurisdiction because "[a]n agency's expertise is superior to that of a court when a dispute centers on whether a particular regulation is reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of the Act the agency is charged with enforcing." The same is true in the context of preemption: an agency is likewise well positioned to determine whether the displacement of state law is reasonably necessary to achieve federal objectives.

4. *Neither the Supremacy Clause nor the Necessary and Proper Clause advances petitioner's and the NGA's argument*

The NGA errs in invoking the Supremacy Clause (Br. 7-10) in support of its argument that agencies lack *Chevron* authority to adopt preemptive regulations absent a specific delegation of authority to preempt state law. The Supremacy Clause provides that the "Judges in every State shall be bound" by federal law, U.S. Const. art. VI, cl. 2, not that "Judges" rather than agencies shall "resolv[e] conflicts between supreme federal law and the laws of

the States." NGA Br. 9. Any such conflict has already been resolved, in favor of federal law, by the Clause itself. Contrary to the NGA's suggestion (*see* Br. 13), moreover, a decision to preempt state law is not a judgment about the meaning of the Constitution; it is, as explained above, quintessentially a policy judgment concerning whether Congress's objectives can best be achieved in the absence of, or in addition to, state regulation.

The NGA fares no better in its reliance (Br. 11-13) on the Necessary and Proper Clause. The NGA submits that the Necessary and Proper Clause confirms Congress's power to delegate to agencies the authority to preempt state law. But nothing in the Necessary and Proper Clause suggests that Congress can *only* do so through a specific grant of preemptive authority as opposed to a general grant of authority to promulgate rules to carry out the agency's responsibilities.

B. The Decisions Relied On By Petitioner And The NGA Do Not Call Into Question The Applicability Of *Chevron* In This Case

Petitioner and the NGA rely on a number of this Court's decisions in arguing that the Comptroller's regulation is not entitled to *Chevron* deference. That reliance is misplaced.

1. To begin, the Court's decision in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) neither sets forth a new standard of deference nor requires an explicit delegation of authority to preempt. *See* NGA Br. 24 (contemplating a "*Medtronic* standard"). The Court in that case concluded that the statute at issue did

not preempt state law—the same conclusion reached by the FDA in its regulations. 518 U.S. at 496-97 & n.16. The Court's independent agreement with the agency's interpretation of statutory limitations does not determine the proper level of deference owed an agency's decision to displace state law in order to effectuate the goals of an ambiguous federal statute.[5] As Justice Breyer affirmed in his concurrence, moreover, "in the absence of a clear congressional command as to pre-emption, courts may infer that the relevant administrative agency possess a degree of leeway to determine which rules, regulations, or other administrative actions will have pre-emptive effect." *Id.* at 505 (Breyer, J., concurring).

2. The Court's decisions in *Gonzales v. Oregon*, 546 U.S. 243 (2006), *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990), and *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986), similarly fail to speak to the nature of delegation necessary for an agency to preempt of its own accord. The Court in *Gonzales* held that the Attorney General lacked implicit authority to issue certain rules when the authorizing act's "express limitations on the Attorney General's authority, and other indications from the statutory scheme, belie[d]" any claim to such power. 546 U.S. at 259-60. *Adams Fruit* is similarly inapposite. Because the statute in question unquestionably "established an enforcement scheme inde-

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[5] The same is true of the Court's decisions in *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1009 (2008), and *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 21 n.13 (2007). The Court declined to address the question of deference in both cases, because the Court found in each case that the statute itself resolved the preemption question.

pendent of the Executive," the Court refused to defer to the Department of Labor's determination of how that scheme should operate. 494 U.S. at 649-50. Likewise, in *Louisiana PSC*, the Court simply held that the FCC's preemption determination exceeded its authority under the statute, which explicitly denied the Commission the authority to regulate the pertinent subject—*viz.*, intrastate service. 476 U.S. at 369-70.

All three decisions thus stand for the proposition that the Court will not defer to an agency decision falling outside of its scope of delegated authority. That does not suggest, however, that specific delegation of preemptive authority is required when the statute is otherwise silent. On the contrary, the *Louisiana PSC* Court reaffirmed the rule that a federal agency may promulgate preemptive regulations "when and if it is acting within the scope of its congressionally delegated authority." *Id.* at 374; *see id.* at 369 (citing *Crisp* and *de la Cuesta*).

3. The Court's decision in *Wyeth v. Levine*, No. 06-1249, slip op. (Mar. 4, 2009), does not cite—much less purport to overrule—the decisions in *Shimer*, *Crisp*, *New York v. FCC*, and *New York v. FERC*, *supra*. Accordingly, *Wyeth* cannot be considered to call into question the long-settled understanding that an agency needs no specific delegation of preemptive authority in order to adopt a preemptive regulation. In addition, the agency's statement about preemption in *Wyeth* was made in a preamble and without notice-and-comment procedures, slip op. at 19, and the statement did not command *Chevron* deference, *id.* at 20 (citing, *inter alia*, *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)). Indeed, the

Court made clear that it had "no occasion in this case to consider the pre-emptive effect of a specific agency regulation bearing the force of law." *Id.* at 24.

This case, by contrast, involves a "full-dress regulation" adopted "pursuant to the notice-and-comment procedures . . . designed to assure due deliberation." *Smiley*, 517 U.S. at 741. That regulation, for all the reasons explained, is fully entitled to *Chevron* deference.

CONCLUSION

For the foregoing reasons, as well as those stated by respondents, the Court should affirm the decision of the court of appeals.

Respectfully submitted,

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

SRI SRINIVASAN
(*Counsel of Record*)
KATHRYN E. TARBERT
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Amicus Curiae

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